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Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry With the Rape Sword Laws

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I. INTRODUCTION

It is an axiom of Evidence law that only relevant evidence may be admitted.[1] In the words of Federal Rule of Evidence 402, "Irrelevant evidence is not admissible."[2] The great English utilitarian philosopher, Jeremy Bentham, opposed almost all exclusionary rules that had the effect of blocking the admission of relevant evidence.[3] Bentham argued that the primary objective of a judicial system must be to achieve rectitude of decision.[4] In one of the most famous passages in his monumental work, *Rationale of Judicial Evidence*, Bentham asserted that "[e]vidence is the basis of justice" and that when you "exclude evidence, you exclude justice."[5]

However, to Bentham's chagrin, exclusionary rules of evidence have proliferated.[6] Some such as the hearsay,[7] opinion,[8] and best evidence[9] rules are based on doubts about the reliability of certain types of certain evidence. We generally exclude hearsay evidence because we prefer that the witness appear before the jury, subject himself or herself to cross-examination, and allow the jury to observe their demeanor during the questioning.[10] Likewise, as a general proposition, we bar opinion testimony because we prefer that the witness restrict his or her testimony to recitations of primary, observed facts and allow the jurors themselves to decide which inferences to draw from those facts.[11]

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1. *See* Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 423 (2015) (discussing the need to admit only relevant evidence for judicial efficiency).

2. FED. R. EVID. 402.

3. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 3 (1985); *see also* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 26 (1827) (commenting that excluding evidence stops the admission of relevant evidence which leads to injustice).

4. BENTHAM, *supra* note 3, at 39; *see also* 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 3.2.2. (2d ed. 2010); TWINING, *supra* note 3, at 179.

5. BENTHAM, *supra* note 3, at 1 (quoted in Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423 (2015)).

6. *See generally* FED. R. EVID. 402 (the rule lists the bases on which a trial judge may exclude logically relevant evidence).

7. RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 429–30 (7th ed. 2012).

8. *Id.* at 577–79, 588–89.

9. *Id.* at 619–20.

10. *Id.* at 430.

11. *Id.* at 577.

However, other exclusionary rules such as communications privileges rest on a very different rationale. These rules are designed to promote extrinsic social policies[12] such as encouraging clients to consult attorneys and patients to confide in therapists.

In the past quarter century, one of the most potent extrinsic policies shaping American evidence law has been the social objective of promoting the effective prosecution and deterrence of sexual assault. In pursuit of that objective, legislatures and courts have effected numerous changes in evidentiary doctrine. By way of example, many jurisdictions over the past twenty-five years have abolished the rule that the alleged victim's testimony must be corroborated by independent evidence to be sufficient to support a conviction.[13] The period has also witnessed changes in many admissibility rules that come into play in sexual assault cases. Some courts have accepted new types of expert testimony, such as opinions about rape trauma syndrome,[14] other courts have applied the hearsay exception for medical statements to assertions about rape,[15] and still other jurisdictions have recognized a new privilege for communications between rape counselors and alleged victims of sexual assault.[16]

Although those changes are noteworthy, perhaps the most significant impact of this pursuit of this extrinsic social policy has been on the character rules. That impact has spawned rape sword statutes as well as rape shield legislation.

Rape sword statutes carve out exceptions to the general ban on evidence of a criminal accused's bad character.[17] Until recently, it was settled law in the United States that unless the accused elected to place his or her character in issue, the prosecution generally could not introduce evidence of the accused's bad character, whether that evidence took the form of reputation, opinion, or specific instances of conduct.[18] The prosecution could not use the evidence as circumstantial proof of conduct; the prosecution may not argue simplistically that the uncharged misdeed shows that the accused has a propensity for such conduct and that in turn, the accused's propensity increases the probability that the

12. *Id.* at 637–42.

13. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 9 (1977).

14. 1 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 9.04 (5th ed. 2012).

15. United States v. Joe, 8 F.3d 1488 (10th Cir. 1993), *cert. denied*, 510 U.S. 1184 (1994); State v. Jackson, 426 S.W.3d 717, 720 (Mo. App. 2014); *see also* FED. R. EVID. 803(4).

16. Rachel M. Capoccia, *Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape Trials*, 68 S. CAL. L. REV. 1335 (1995); Maureen B. Hogan, *The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling*, 30 B.C. L. REV. 411, 412 n. 6 (1989); *see, e.g.*, ALA. R. EVID. 503A.

17. 1 EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 803 (5th ed. 2011) [hereinafter COURTROOM CRIMINAL EVIDENCE].

18. FED. R. EVID. 404–05; 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19 (rev. 2013) [hereinafter UNCHARGED MISCONDUCT EVIDENCE].

accused committed the charged crime.[19] In particular, as Federal Rule of Evidence 404(b) indicates,[20] to justify the admission of testimony about other, uncharged incidents of the accused's misconduct, the prosecution had to show that the testimony was logically relevant on a non-character theory.[21] However, as part of the national campaign against sexual assault, Congress enacted Federal Rule of Evidence 413.[22] In pertinent part, Rule 413(a) states: "In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant."[23] The statute selectively repeals the character evidence prohibition and permits the prosecution to do what it still cannot do in murder, espionage, or theft cases: The prosecution may now argue that the evidence shows that the accused is a sexual predator and that it is therefore more likely that he or she committed the charged offense.[24] Almost two-fifths of the states have followed the federal example and adopted new statutes or rules permitting propensity evidence in sexual assault cases.[25]

Although rape sword statutes authorize the admission of previously excluded evidence, rape shield statutes have the opposite effect. Rape sword statutes deal with evidence of the accused's sexual misconduct while rape shield statutes relate to evidence of the alleged victim's sexual behavior.[26] While rape sword statutes liberalize admissibility standards for introducing testimony about the accused's other sexual conduct, rape shield statutes make it more difficult for the defense to introduce evidence of the alleged victim's sexual conduct.[27] Federal Rule of Evidence 412 is illustrative.[28] Subject to a number of exceptions set out in Rule 412(b), Rule 412(a) announces a general rule that:

> The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> (1) evidence offered to prove that a victim engaged in other sexual behavior; or

19. *Id.*

20. FED. R. EVID. 404.

21. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at §§ 2:21–22.

22. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at § 2:25; COURTROOM CRIMINAL EVIDENCE, *supra* note 17, at § 807.

23. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18.

24. *Id.* at § 2:25.

25. *Id.* (listing developments in Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, Oklahoma, Oregon, Texas, Utah, and Washington).

26. *Id.* §§ 803, 807.

27. *Id.*

28. FED. R. EVID. 412.

(2) evidence offered to prove a victim's sexual predisposition.[29]

The majority of states have adopted rape shield legislation or court rules.[30]

The proponents of such legislation have advanced several justifications for restricting the admission of evidence of the alleged victim's sexual behavior. One justification is that the prior liberal standards for admitting such evidence deterred rape victims from coming forward to report the offense.[31] Victims would be reluctant to come forward if they realized the defense could parade their prior sexual histories in open court at public trials to demean them.[32] Another justification is that given modern sexual mores, the evidence has minimal probative value and, more specifically, sheds little light on the question of whether the alleged victim consented to intercourse with the accused.[33] Sexual attraction is heavily dependent on the personal chemistry between two people, and a woman's willingness to engage in intercourse with one man may tell the jury virtually nothing about her willingness to consent to sex with another partner.[34]

In most cases, rape shield statutes are applied to bar the admission of evidence that the defense attempts to introduce on the historical merits of the case. Thus, if the accused admits intercourse but claims that the intercourse was consensual, the accused ordinarily may not introduce evidence of the alleged victim's other sexual contacts in order to prove her consent. However, in other cases the statutes are invoked to block the introduction of evidence that the accused offers to attack the alleged victim's credibility. Many rape shield statutes apply to such defense evidence whether it is offered on the historical merits or on the issue of the alleged victim's believability.[35]

It is relatively easy to defend the wisdom of the invocation of a rape shield statute when it is applied to exclude evidence with little or no relevance in the case. By way of example, suppose that the accused argues that the evidence shows the alleged victim's promiscuity and that a promiscuous person is likely to be untruthful. At one time, many American courts accepted that argument.[36] Sexual promiscuity was considered highly immoral and raised grave questions

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29. *Id.*

30. COURTROOM CRIMINAL EVIDENCE, *supra* note 17, at § 807; Michelle J. Anderson, *Time to Reform Rape Shield Laws: Kobe Bryant Cases Highlights Holes in the Armor*, 19 CRIM. JUST. 14, 15–16 (Sum. 2004).

31. Commonwealth v. Crider, 240 Pa. Super. 403, 361 A. 2d 352 (1976).

32. *See* Anderson v. Morrow, 371 F.3d 1027, 1030 (9th Cir. 2004).

33. Pamela Lakes Wood, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973); Camille E. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

34. *Cf.* Lakes Wood, *supra* note 33, at 345 (noting that a women's consent to sexual relations in the past does not show she consented to a particular man on a particular occasion); LeGrand, *supra* note 33, at 939.

35. Anderson, *supra* note 30, at 14*; see* CAL. EVID. CODE § 782 (the statute applies when "evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness.").

36. CARLSON ET AL., *supra* note 7, at 308.

about the person's character, including his or her truthfulness.[37] However, today most judges would reject that argument as antiquated and sexist.[38]

In other cases, though, it is more difficult to uphold the application of a rape shield law. It may be plain that the proffered evidence is logically relevant or even that it is highly relevant to the facts of consequence in the case. Assume that the alleged victim denies consenting to intercourse with the accused. However, the defense has evidence that both the day before and the day after the charged offense, the alleged victim engaged in casual sex with other men under strikingly similar circumstances. In this situation, it is much harder to dismiss the defense's evidence as immaterial and inconsequential.

When a court applies an exclusionary rule to block an accused's attempt to submit highly relevant evidence to the jury, the accused have sometimes responded by invoking their constitutional right to introduce critical, demonstrably reliable evidence. The genesis of this right is the Supreme Court's 1967 decision in *Washington v. Texas.*[39] In that case, the Court dealt with the constitutionality of two Texas statutes which provided that an accused could not call as a defense witness any person charged or previously convicted as a principal, accomplice, or accessory, in the same crime.[40] The statutes rendered such persons incompetent as defense witnesses.[41] The accused, Jackie Washington, was charged with murder.[42] Washington attempted to call Charles Fuller as a witness.[43] The defense made an offer of proof that Fuller would testify that the accused had attempted to prevent Fuller from shooting.[44] However, Fuller had already been convicted of murder in the same shooting incident.[45] Citing the two Texas statutes, the prosecutor objected to Fuller's testimony,[46] and the trial judge sustained the objection.[47] Washington was convicted.[48] On appeal, the Supreme Court reversed the conviction.[49]

In its opinion, the Court made two significant rulings. First, Chief Justice Warren held that the compulsory process guarantee of the Sixth Amendment is so fundamental that it is incorporated by the Fourteenth Amendment Due Process

37. *See* Lakes Wood, *supra* note 33, at 343 (noting that a victim's chastity could also be admissible for her credibility for truthfulness, although most judges do not admit it for this purpose).

38. *Cf. id.* at 345 (commenting that most judges do not admit consent or chastity history as proof of character for truthfulness).

39. 388 U.S. 14 (1967).

40. *Id.* at 16–17.

41. *Id.*

42. *Id.* at 15.

43. *Id.* at 16.

44. *Id.*

45. *Id.*

46. *Id.* at 17.

47. *Id.*

48. *Id.* at 15, 17.

49. *Id.* at 17, 23.

clause and therefore directly enforceable against the states.[50] Both sides had to have the power of compulsory process to ensure a fair adversarial trial.[51] Second, the Court held that the Texas statutes violated the compulsory process guarantee.[52] Texas had argued that it had not denied Washington compulsory process; Texas allowed Washington to subpoena Fuller and merely prevented Washington from calling Fuller as a witness.[53] That argument struck the Court as absurd. Chief Justice Warren reasoned that "[t]he Framers did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he has no right to use."[54] The Court granted the accused a general "right to put on the stand a witness who [is] physically and mentally capable of testifying to events that he [has] personally observed, and whose testimony would have been relevant and material to the defense."[55] In short, the Court found that under the Sixth Amendment, the accused has both an express right to compulsory process and an implied right to present testimony by defense witnesses.[56]

Although *Washington* was a landmark decision, its initial impact was limited. Many, if not most, lower courts believed that its teaching applied only to broad incompetency rules that completely barred persons from appearing as defense witnesses.[57] However, the Supreme Court ultimately proved those courts wrong when the Court rendered its 1973 decision in *Chambers v. Mississippi.*[58] One of the alleged constitutional errors in the case was the trial judge's exclusion of vital, exculpatory hearsay evidence.[59] The Court powerfully reaffirmed *Washington.*[60] Citing *Washington,* Justice Powell concluded that the trial judge's ruling violated the accused's "right to present witnesses in his own defense."[61] The Court refused to limit the application of the constitutional right to competency doctrines, altogether barring a prospective witness's testimony.[62] The Court extended the reach of the constitutional doctrine to exclusionary rules that have the more limited effect of preventing a witness from giving particular

50. *Id.* at 19.

51. *See id.* (stating that a fundamental element of due process is allowing a defendant in a criminal trial to present his own witnesses to establish his defense).

52. *Id.* at 23.

53. *See id.* at 19 (stating that although the state had afforded the accused compulsory process in a narrow, technical sense, the witness's mere presence in the courtroom was inconsequential because the witness's testimony was barred).

54. *Id.* at 23.

55. *Id.*

56. *Id.* at 19, 23.

57. People v. Scott, 52 Ill. 2d 432, 288 N.E.2d 478 (1972), *cert. denied,* 410 U.S. 941 (1973).

58. *Id.*

59. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

60. *Id.* at 302.

61. *Id.*

62. *See generally id.*

testimony.[63] In the instant case, the trial judge's ruling ran afoul of the right because the excluded hearsay was both critical to Chambers' defense and "bore persuasive assurances of trustworthiness."[64] It is true that in some cases, the Court has rejected *Washington/Chambers* attacks on some types of defense testimony such as polygraph evidence,[65] but the Court has reaffirmed the continuing precedential value of this line of authority as recently as 2013.[66] The upshot is that under the Sixth Amendment, when the accused can demonstrate that a particular item of evidence is both reliable and critical to the defense, the court must balance the accused's need for the evidence against the interests supporting the exclusionary rule.[67] If the accused's need preponderates, the application of the statutory or common-law exclusionary rule is unconstitutional,[68] and the Sixth Amendment enables the accused to introduce the otherwise inadmissible evidence.

It should come as no surprise that the accused have frequently turned to this theory to override evidentiary restrictions imposed by rape shield statutes.[69] Because rape shield statutes serve the important purpose of encouraging rape victims to come forward, it should also come as no surprise that in the majority of cases, the courts have sustained the statutes against such constitutional attacks.[70] However, in tens of cases, the courts have found that particular applications of the statutes violated the accused's Sixth Amendment rights.[71]

Today, the fiercest battleground is the application of rape shield statutes to preclude an accused from introducing evidence that the alleged victim has made recent, similar, false rape accusations.[72] This theory for surmounting rape shield statutes has probably generated more published opinions than any other constitutional attack that the accused have mounted on such statutes.[73] Moreover, as we shall see in Part II of this article, the defense efforts to invoke the Sixth Amendment to surmount restrictions on evidence of the alleged victim's earlier

63. *See generally id*.

64. *Id.* at 302.

65. United States v. Scheffer, 523 U.S. 303 (1998).

66. Nevada v. Jackson, 133 S. Ct. 1990 (2013).

67. EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE 59 (5th ed. 2015); Stein, *supra* note 1, at 460–69.

68. IMWINKELRIED & GARLAND, *supra* note 67, § 2-3 (stating that the court rules only on the application of the rule, not the rule's facial validity).

69. *Id.* at § 9-4.

70. Joel L. Smith, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283 §2 (1980).

71. IMWINKELRIED & GARLAND, *supra* note 67, § 9-4.b (collecting the cases).

72. *Id.* at § 8-5.

73. *See generally* Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125 (1998) (addressing judicial struggles with the admissibility of prior false accusations of rape).

rape complaints have badly divided the courts.[74] As Part II of this article notes, the courts have split over three issues: the threshold question of whether this impeachment technique is permissible; if so, the conditions under which the accused may cross-examine the alleged victim about the prior rape complaints; and whether the accused may introduce extrinsic evidence of the complainants' falsity if the alleged victim refuses to concede the prior complaint or its falsity.[75]

The theses of this article are that under certain circumstances, the accused have the right to cross-examine the alleged victim about the earlier complaints and that if the alleged victim refuses to concede the report and its falsity, the accused have the further right to later introduce extrinsic evidence to prove the earlier complaint. This article proceeds in the following manner to develop those theses. Part I of the article is descriptive, surveying the case law addressing defense attacks on the constitutionality of various applications of rape shield statutes.[76] This part is intended to give the reader a sense of the rigor of the threshold that the accused must meet to surmount an exclusionary rule codified in a rape shield statute. In contrast, Part II of the article is evaluative, discussing the merits of three policy questions mentioned above: Is it justifiable to completely ban defense inquiry about the alleged victim's prior, false rape accusations?[77] If not, under what circumstances should the accused be allowed to cross-examine the alleged victim about the accusations?[78] And, finally, if the alleged victim balks at conceding the prior complaint and its falsity, should the accused be permitted to introduce extrinsic evidence to prove the fact of the earlier, false rape accusation?[79] After analyzing these three questions, the article concludes that in some circumstances, an accused should be entitled to both cross-examine the alleged victim about and introduce extrinsic evidence of similar, demonstrably false rape accusations.[80] Based on the sort of character reasoning underlying the rape sword statutes, proof of the alleged victim's prior false accusations is just as probative of the accused's claim that the alleged victim is falsely accusing him as proof of the accused's prior sexual assaults is corroborative of the alleged victim's claim that he assaulted her.

74. *Infra* Part II.
75. *Infra* Part II.
76. *Infra* Part I.
77. *Infra* Part II.A.
78. *Infra* Part II.B.
79. *Infra* Part II.C.
80. *Infra* Part III.

II. A DESCRIPTION OF THE PRINCIPAL THEORIES THAT DEFENSE COUNSEL HAVE USED TO ATTACK THE CONSTITUTIONALITY OF APPLICATIONS OF THE RAPE SHIELD LAWS EXCLUDING EXCULPATORY EVIDENCE

In the past quarter century, defense counsel and sympathetic academic commentators have proposed a myriad of theories for attacking the constitutionality of applications of rape shield laws.

A. Theories that Have Garnered Little or No Legislative or Judicial Support

In some cases, commentators have proposed theories that as a practical matter, have been complete failures in the sense that no legislature has amended its rape shield law to incorporate the theory and no court has sustained a constitutional attack premised on the theory. For example, some have suggested that the courts ought to admit evidence of the alleged victim's other sexual behavior when, in a broad sense, the alleged victim has engaged in a pattern of promiscuous conduct.[81] However, a woman's willingness to consent to intercourse with one man can be such a poor predictor of her willingness to do so with a different man that for the most part, the courts have flatly rejected this theory.[82] Likewise, it has been contended that the courts should admit evidence that the alleged victim is a nymphomaniac.[83] To date, only one court has embraced that contention.[84]

B. Theories that Are So Strong that Legislatures Have Recognized the Theories by Codifying Them in Their Rape Shield Statutes

Part I.A described defense theories that have been complete or virtual failures.[85] Neither legislatures nor most courts have discerned that evidence of the alleged victim's other sexual behavior has significant probative value under those theories.[86] In sharp contrast, on some theories the evidence has such obvious probative worth that many legislatures have felt compelled to recognize these theories in their rape shield laws in order to moot constitutional challenges to the laws.

By way of example, Federal Rule of Evidence 412(b)(1)(A) reads:

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81. Leon Letwin, *Unchaste Character, Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 74 (1980); J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 587–89 (1980).

82. Baker v. Lewis, No. 07-171896 (9th Cir. 2009); Jeffries v. Nix, 912 F.2d 982 (8th Cir. 1990), *cert. denied*, 499 U.S. 927 (1991).

83. State v. Jones, 716 S.W.2d 799, 803 (Mo. 1986) (Blackmar, J., dissenting).

84. Chew v. State, 804 S.W.2d 633 (Tex. Ct. App. 1991).

85. See *infra* Part I.A.

86. See *infra* Part I.A.

> Criminal cases. The court may admit the following evidence in a criminal case . . . evidence of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of the semen, injury, or other physical evidence.[87]

This is sometimes referred to as the "Scottsboro rebuttal" provision.[88] The provision "takes its name from the Depression era cause celebre in which a group of Afro-American men were charged with raping two white women on a freight train."[89] In that case, the prosecution offered medical testimony that semen had been found in the women's vaginas, but the trial judge excluded defense rebuttal evidence that the women had engaged in intercourse with other men the night before.[90] The ruling excluding the evidence was so shocking that it clearly violated due process and denied the accused a fair trial.[91] If the prosecution offers expert evidence of the presence of sperm or semen, that evidence can powerfully corroborate the alleged victim's testimony that there was intercourse on the occasion alleged in the indictment or information. Especially since the prosecution has opened the issue, the accused should have the right to respond by furnishing an alternative, innocent explanation for the presence of the sperm or semen, even when the explanation takes the form of other sexual conduct of the alleged victim. The federal drafters incorporated this theory in the wording of Rule 412 in order to preclude the result reached in that case and to moot that constitutional challenge to the federal rape shield law.

The Scottsboro rebuttal provision is not the only theory codified in Rule 412(b). In pertinent part, Rule 412(b)(1)(B) states that:

> Criminal cases. The court may admit the following evidence in a criminal case . . . evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct if offered by the defendant to prove consent.[92]

Suppose that the alleged victim and the accused have a "history of intimacies."[93] It is one thing to infer the alleged victim's consent to intercourse with the accused from the alleged victim's intercourse with an entirely different person. That inference is a weak one. However, evidence of the personal relationship between the alleged victim and the accused bears so heavily on the issue of

87. FED. R. EVID. 412.

88. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *Federal Rules of Evidence Rules 408 to 501, Sections 5272 to 5450*, *in* FEDERAL PRACTICE AND PROCEDURE 590–91 (1980).

89. *Id.*

90. *Id.*

91. *Id.*

92. FED. R. EVID. 412.

93. Berger, *supra* note 13, at 58.

consent on the charged occasion[94] that it would offend common sense and the Constitution to exclude the evidence. Like Rule 412, many state rape shield statutes expressly provide that despite the general ban on testimony about the alleged victim's other sexual conduct, evidence of her other acts of sexual intercourse with the accused is admissible.[95]

C. Non-Statutory Theories that Are Strong Enough to Have Gained Substantial Judicial Support

There is substantial judicial support for another theory even though, to date, no legislature has codified the theory. The theory comes into play when the alleged victim is very young. The theory, in essence, states:

> Lay jurors probably assume that young children know little about sexual matters. On that assumption, when a youthful complainant testifies in great detail about sexual intercourse with the accused, the jurors may leap to the conclusion that the complainant would not know so much about sexual matters unless the alleged intercourse had occurred. The accused can attempt to defeat this conclusion by showing that the complainant had sexual intercourse with third parties on other occasions. The showing would provide an alternative explanation for the complainant's knowledge.[96]

Without the evidence of the young victim's other sexual experiences, the jurors may draw the mistaken inference that the very detail of the alleged victim's account corroborates the alleged victim's testimony about the charged offense. It is true that even here some courts have refused to carve out a constitutional exception to the rape shield law's ban.[97] However, a large number of courts have ruled that it is unconstitutional to apply a rape shield law to exclude evidence that would counter the inference that lay jurors might otherwise draw from a young victim's sexual knowledge.[98] In the words of the Maine Supreme Court, "[a]

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94. Letwin, *supra* note 81, at 72.

95. *E.g.*, ARIZ. REV. STAT. § 13-1421; ARK. CODE ANN. § 16-42-101; CONN. GEN. STAT. § 54-86(f); MD. CODE ANN. § 3-319; N.J. STAT. § 2C:14-7; 18 PA. CONS. STAT. § 3018; S.C. CODE ANN. § 16-3-659.1; 12 VT. STAT. ANN. §§ 1646, 3255; W.VA. CODE §§ 61-8-13, 61-8B-11; WIS. STAT. § 971.31.

96. IMWINKELRIED & GARLAND, *supra* note 67, § 9-4.b.(1)B.

97. People v. Arenda, 416 Mich. 1, 15, 330 N.W.2d 814, 819 (1982) (Kavangh & Levin, JJ., dissenting).

98. Ellsworth v. Warden, New Hampshire State Prison, 242 F.Supp.2d 95, 103–06 (N.H. 2002) (an eleven-year-old child), *vacated*, 2003 U.S.App.LEXIS 7101 (1st Cir. Apr. 10, 2003); Carrigan v. Arvonio, 871 F.Supp. 222 (D.N.J. 1994); People v. Salas, 30 Cal. App. 4th 417, 36 Cal. Rptr. 2d 374 (1994), *opinion withdrawn*, 1995 Cal.LEXIS 1115 (Cal. Feb. 23, 1995); Dixon v. State, 605 So. 2d 960, 961–62 (Fla. Dist. Ct. App. 1992); People v. Mason, 219 Ill. App. 3d 76, 78–79, 578 N.E.2s 1351, 1354–55 (1991) (the accused contended that the child learned about the sexual conduct by viewing a sexually explicit video); State v. Lampley, 859 S.W.2d 909 (Mo. App. 1993) (a nine-year-old victim); State v. Howard, 121 N.H. 53, 61, 426 A.2d 457, 462 (1981) (a twelve-year-old girl); State v. Peyton, 142 N.M. 385, 389–90, 165 P.3d 1161, 1165–66

defendant . . . must be permitted to rebut the inference a jury might otherwise draw that the victim was so naive sexually that she could not have fabricated the charge."[99] After surveying the case law, the court observed that "[a] number of jurisdictions" have recognized the accused's constitutional right to surmount a rape shield law "for the limited purpose[] of rebutting the jury's natural assumption concerning a child's sexual innocence."[100]

D. Summary

At first blush, all these theories appear to share the common denominator that they relate to the historical merits of the case rather than merely to the alleged victim's credibility. The successful theories described in Part I.B and Part I.C. do not entail evidence that, on its face, concerns the alleged victim's credibility.[101] Superficially, the theories do not involve applications of the impeachment techniques codified in Article VI of the Federal Rules of Evidence. The defense counsel is not offering evidence that the victim has previously engaged in deceitful conduct (Rule 608(b)),[102] has suffered a prior conviction (Rule 609),[103] or has made a prior statement inconsistent with his or her trial testimony (Rule 613).[104] In a formal sense, it is arguable that the courts should more readily override rape shield statutes when the defense evidence relates to the historical merits rather than credibility. The jury's ultimate task is to decide the facts on the historical merits that determine guilt or innocence. Credibility evidence is one step removed from that task; credibility evidence is useful only to the extent that it helps the jury evaluate the witness's testimony on the historical merits.

However, on closer scrutiny, the rationale underlying two of the most powerful theories bears on the alleged victim's credibility. Initially, consider the Scottsboro rebuttal provision described in Subpart I.B.[105] That provision comes into play when, as in the original Scottsboro case, the prosecution offers evidence about the presence of semen or sperm to corroborate the alleged victim's

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(a lay juror might naturally assume that an eight-year-old child would not know about oral sex or digital penetration unless the charged acts had occurred), *cert. denied*, 142 N.M. 435, 166 P.3d 1088 (2007); Commonwealth v. Appenzeller, 388 Pa. Super. 172, 173, 565 A.2d 170, 171 (1988); State v. Pulizzano, 148 Wis.2d 190, 434 N.W.2d 807, 811 (Ct. App. 1988), aff'd, 155 Wis.2d 633, 456 N.W.2d 325 (1990); MARK J. MAHONEY, THE RIGHT TO PRESENT A DEFENSE 128 (2014).

99. State v. Jacques, 558 A.2d 706, 708 (Me. 1989).

100. *Id.*; *see* Danny R. Veilleux, *Admissibility of Evidence of Juvenile Prosecuting Witness in Sex Offense Case Had Prior Sexual Experience for Purposes of Showing Alternative Source of Child's Ability to Describe Sex Acts*, 83 A.L.R.4th 685 (1991); Christopher B. Reid, T*he Sexual Innocence Inference Theory as a Basis for the Admissibility of a Child Molestation Victim's Prior Sexual Conduct*, 91 MICH. L. REV. 827 (1993).

101. *See supra* Part I.B–C.

102. *See generally* FED. R. EVID. 608(b).

103. *See generally* FED. R. EVID. 609.

104. FED. R. EVID. 613.

105. *See supra* Part I.B.

testimony that there has been intercourse.[106] Such corroboration enhances the alleged victim's credibility in the jurors' eyes unless and until they learn that there is an alternative, innocent explanation for the presence of the semen. Likewise, the sexual innocence inference described in Subpart I.C bears on the alleged victim's credibility.[107] The courts admit the evidence of the young victim's other sexual experience precisely because the courts fear that the jurors will erroneously treat the very detail of the alleged victim's account as corroboration of the alleged victim's testimony and, on that basis, deem the alleged victim more believable. These theories may not involve the conventional impeachment techniques codified in Article VI, but as a practical matter, they admit evidence of the alleged victim's other sexual conduct to enable the jury to make a more informed assessment of the alleged victim's credibility.

III. A CRITICAL EVALUATION OF THE ARGUMENT THAT THE ACCUSED SHOULD BE ENTITLED TO INTRODUCE EVIDENCE OF THE ALLEGED VICTIM'S RECENT, SIMILAR, FALSE RAPE ACCUSATIONS

While Part I is descriptive, this part is frankly evaluative. More specifically, the purpose of Part II is to evaluate the policy merits of the case for permitting an accused to introduce evidence of the alleged victim's prior false rape accusations—to allow the accused to cross-examine the alleged victim about the accusations and perhaps even go so far as to permit the accused to introduce extrinsic evidence of the accusations. This type of testimony is undeniably credibility evidence rather than evidence on the historical merits; the objective is to attack the alleged victim's credibility, notably the credibility of her testimony about the charged crime. As the Introduction noted, some rape shield statutes purport to ban evidence relating to the alleged victim's credibility.[108] The Introduction also pointed out that defense attempts to introduce evidence of prior false complaints are generating more published opinions on the constitutionality of rape shield laws than any other defense theory and that the courts are sharply divided over the propriety of such defense attempts.[109]

To assess the validity of the case for permitting such evidence, we must address three questions: Would a complete ban on such evidence be justifiable? If not, under what circumstances should the courts permit the accused to at least cross-examine the alleged victim about prior, false rape accusations? And if the alleged victim denies the accusation or its falsity, should the courts allow the accused to go father and introduce extrinsic evidence of the prior, false accusation?

106. *See supra* Part I.B.

107. *See supra* Part I.C.

108. *E.g.*, CAL. EVID. CODE § 782.

109. *See supra* notes 72 and 73.

A. The Threshold Question: Would It Be Justifiable to Bar All Defense Inquiry About the Alleged Victim's Prior, False Rape Accusations?

There are two conceivable theories for rationalizing a complete ban on all defense inquiry about prior, false rape accusations.

1. Such Evidence Has No Logical Relevance in a Rape Prosecution

Federal Rule of Evidence 401 states the test for logical relevance:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.[110]

The item of evidence need not make it more likely than not that the fact of consequence exists.[111] This standard of relevance is very low.[112] Any slight relevance suffices.[113] The item of evidence need only nudge the balance of probabilities a bit up or a bit down.

Given that lax standard, most courts would reject the argument that evidence of the alleged victim's prior, false rape accusations is utterly irrelevant. The alleged victim's credibility comes into issue as soon as she testifies, and prior false statements arguably shed some light on the alleged victim's credibility. Indeed, Federal Rule of Evidence 608(b), permitting cross-examination about a witness' prior untruthful acts, is premised on the assumption that earlier, untruthful statements bear on the witness's credibility.[114]

There is only one counter-argument. Ultimately, proof of a witness's untruthful conduct is admitted on a character evidence theory.[115] The theory is that the untruthful act evidences the witness's character trait for untruthfulness and that in turn, that character trait increases the probability that the witness's

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110. FED. R. EVID. 401.

111. Adv. Comm. Note, FED. R. EVID. 401.

112. United States v. Nason, 9 F.3d 155, 162 (1st Cir. 1993), *cert. denied*, 510 U.S. 1207 (1994).

113. United States v. Casares-Cardenas, 14 F.3d 1283, 1287 (8th Cir.), *cert. denied*, 513 U.S. 849 (1994).

114. Federal Rule 608(b)(1) reads:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for . . . untruthfulness of . . . the witness.

FED. R. EVID. 608.

115. CARLSON ET AL., *supra* note 7, at 387–88.

trial testimony is untruthful.[116] To justify admitting the untruthful act as credibility evidence under this theory, the proponent must be able to establish both essential inferences: the existence of the character trait and the trait's status as circumstantial evidence of the witness's credibility.[117] One commentator has argued that all the modern psychological research points to the conclusion that it is unsound to infer the existence of a character trait from a single instance of conduct.[118] If so, standing alone a single prior untruthful act would be insufficient to justify the inference that the witness possesses a character trait of untruthfulness; and if a single instance will not support the first inference, the proponent cannot even reach the second inference. The commentator is correct in noting that there does not seem to be a single reputable, contemporary psychologist who would defend inferring a character trait from one instance of conduct.[119]

However, it is an understatement to say that the commentator is the "voice of one calling out in the wilderness."[120] His position is at odds with the legislative judgments underlying not only Rule 608(b), but also the rape sword statute, Rule 413.[121] The rape sword statute permits the proponent of the accused's other sexual misconduct to treat the accused's other sexual misdeeds as a basis for inferring the accused's disposition and to employ that disposition as circumstantial proof that the accused committed the charged offense.[122] Significantly, the statute does not require the prosecution to present evidence that the accused has committed multiple uncharged sexual assaults.[123] The statute allows the prosecutor to invoke the statute and engage in propensity reasoning even when the prosecution has evidence of only one uncharged incident.[124] The statutes, Rules 608 and 413, implicitly reject the argument that an inference of

116. *Id.*

117. CARLSON, *supra* note 7, at 387.

118. Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 759-61 (2008) [hereinafter Imwinkelried *Reshaping*]; *see also* Andrew Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 SO. CAL. L. & WOMEN'S STUDIES 389, 495 (1996) ("a single prior incident").

119. Imwinkelried *Reshaping*, *supra* note 118, at 760–61. To an extent the California instructions related to that state's rape sword states recognize this problem. At first, the instructions were worded so broadly that they suggested that based on a single uncharged act, the jury could infer the accused's propensity and then find the accused guilty of the charged offense. However, those instructions have been revised to inform the jury that standing alone, a single uncharged act is insufficient to prove the accused's guilt. CALJIC 2.50.1 (Fall 2012 Edition); People v. Younger, 84 Cal. App. 4th 1360, 1383–84 (2000); People v. James, 81 Cal. App. 4th 1343, 1353 (2000).

120. *Isaiah* 40:3.

121. Edward J. Imwinkelried, *Formalism Versus Pragmatism in Evidence: Reconsidering the Absolute Ban on the Use of Extrinsic Evidence to Prove Impeaching, Untruthful Acts That Have Not Resulted in a Conviction*, 48 CREIGHTON L. REV. 213, 231 (2015) [hereinafter Imwinkelried *Formalism*].

122. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, §§ 2:24, 2:26.

123. *See* FED. R. EVID. 413.

124. FED. R. EVID. 608; FED. R. EVID. 413.

character is warranted only when there are multiple other incidents.[125] Moreover, to date there is not a single published opinion holding that a litigant may invoke Rule 608 or 413 only when the litigant has evidence of multiple other incidents. Given the state of the law, an argument that evidence of the alleged victim's prior, false rape accusations is completely irrelevant will fall on deaf judicial ears.

2. Such Evidence Has Such Minimal Relevance That It Is Unjustifiable to Spend the Court Time Necessary to Present Such Evidence and Potentially Prejudice the Jury's Perception of the Alleged Victim

Even conceding that evidence of prior, false rape accusations has some relevance, the proponent of a complete ban could argue that the probative value of the evidence is too minimal.

That argument would have merit if the proponent claimed only that the evidence showed that the alleged victim is capable of lying. The Bible teaches that "[e]veryone is a liar."[126] Any mentally competent adult realizes that every other human being is capable of being untruthful. If that were the proponent's only claim to logical relevance, the trial judge should bar the evidence under Federal Rule 403.[127] That statute allows the judge to exclude logically relevant evidence when the probative value of the evidence is substantially outweighed by the countervailing consideration of "wasting time."[128] If the jury has even the slightest familiarity with human history, it is a waste of their time to present evidence for the limited purpose of showing that the alleged victim could be lying.

However, any court familiar with the policy rationale of rape sword statutes will reject this argument that evidence of the alleged victim's prior false complaint has minimal probative worth. The premise of such statutes is that rape prosecutions often devolve into "he said, she said" disputes.[129] She says that the accused raped her while the accused says that they did not have intercourse. She says that the accused forced her to have intercourse with him while he says that the intercourse was consensual. When Rule 413 was submitted to Congress, it was accompanied with legislative history materials stating the Justice Department's contention that:

> Adult-victim sexual assault cases are distinctive, and often turn on difficult credibility determinations. Knowledge that the defendant has

125. FED. R. EVID. 608; FED. R. EVID. 413.

126. *Psalms* 116:11.

127. FED. R. EVID. 403.

128. *Id.*

129. John Matson, *Huskers Jump On Congress's Fumble: Nebraska Rules of Evidence 413–15 Correct the Facial Deficiencies of Federal Rules of Evidence 413-15*, 45 CREIGHTON L. REV. 277, 309 (2011).

> committed rapes on other occasions is frequently critical in assessing the relative plausibility of the claims and accurately deciding cases that would otherwise become unresolvable swearing matches.[130]

In explaining the rationale for its state rape sword law, the California Supreme Court recently asserted:

> By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations.[131]

Admittedly, it does not appear that there are any empirical studies establishing rape prosecutions turn on the jurors' assessment of the relative credibility of the complainant and the accused more than all or most other types of cases. However, in the past forty years, the author has had numerous opportunities to discuss the topic of rape prosecutions with both veteran prosecutors and experienced defense counsel. For the most part, those discussions confirmed the generalization that credibility assessments are especially important in rape prosecutions. In particular, many prosecutors have told the author that prior to the widespread enactment of rape sword statutes, prosecutors were reluctant to file rape charges when it was clear that the trial would be nothing more than a "he said, she said" dispute.

Positing this policy rationale for rape sword statutes, it becomes difficult, if not logically impossible, to justify a complete ban on defense evidence of the alleged victim's prior, false rape accusations. In advocating for rape sword statutes, the government relies on the assumption that juries hearing a rape case have a special need for evidence enabling them to intelligently evaluate the relative credibility of the alleged victim and the accused. The statutes permit admitting evidence of the accused's similar sexual misconduct that corroborates the alleged victim's testimony and thereby indirectly enhances the alleged victim's credibility.[132] If that policy rationale is sound, the defense is on firm ground when it argues that the victim's credibility is such a central issue in rape cases that the jury needs to know that the alleged victim has a propensity for making similar, false accusations.

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130. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, § 2:25, at 2-162. Section 2:25 sets out the materials in their entirety.

131. People v. Avila, 59 Cal. 4th 496 (2014), *cert. denied*, 135 S. Ct. 1712 (2015); *see also* People v. Walker, 139 Cal. App. 4th 782, 801 (2006) (the "ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations").

132. Imwinkelried *Formalism*, *supra* note 121, at 231.

B. The Next Question: If a Complete Ban Is Unjustifiable, Under What Conditions Should the Defense Be Permitted to at Least Cross-Examine the Alleged Victim about Prior, False Rape Accusations?

In exploring the threshold question, we saw an initial parallel between rape shield and rape sword statutes. As we have seen, prosecutors argue that credibility determinations are so important in rape prosecutions that they should be permitted to corroborate the alleged victim's testimony with evidence of the accused's other sexual assaults. Similarly, defense counsel contend that because credibility is such a pivotal concern in rape prosecutions, they ought to be allowed to attack the alleged victim's believability by proving that she has made false rape accusations in the past.

When we reach the next question—the conditions in which defense cross-examination should be permitted—there are further parallels between rape sword and rape shield statutes. The parallels relate to two sub-issues: May the defense inquire about any prior sexual assault accusation, or should the trial judge restrict the defense to accusations that are similar to the accusation in the instant case? And, what standard must the defense satisfy to establish that the prior accusation was false and untruthful?

1. The Similarity Between the Prior Rape Accusation and the Accusation in the Instant Case

By its terms, the typical federal rape sword statute is not limited to uncharged sexual misconduct that is similar to the charged sexual assault.[133] For example, although the adjective "similar" appears in the title of Federal Rule 413,[134] the adjective appears nowhere in the text of the rule.[135] California Evidence Code § 1108 is an analogue to Rule 413.[136] The term "similar" does not appear anywhere in either the title of that statute or its body.[137] Nevertheless, in applying rape sword laws, both federal[138] and state[139] courts routinely inquire whether

133. FED. R. EVID. 413(a).

134. FED. R. EVID. 413.

135. *Id.*

136. CAL. EVID. CODE § 1108.

137. *Id.*

138. *E.g.*, United States v. O'Connor, 650 F.3d 839 (2d Cir. 2011) (parallels), Sacco v. U.S., 132 S. Ct. 1040 (2012); United States v. Holy Bull, 613 F.3d 871 (8th Cir.2010) (a pattern of abuse similar to the charged offense); United States v. Batton, 602 F.3d 1191, 1196–98 (10th Cir. 2010) (striking similarities); United States v. Rodriguez, 581 F.3d 775 (8th Cir. 2009) (a manner similar to the charged crime), *cert. denied*, 562 U.S. 981 (2010); United States v. Hollow Horn, 523 F.3d 882 (8th Cir. 2008) (there were numerous similarities); United States v. Hawpetoss, 478 F.3d 820 (7th Cir. 2007); United States v. Julian, 427 F.3d 471, 486–87 (7th Cir. 2005), *cert. denied*, 546 U.S. 1220 (2006); United States v. Carter, 410 F.3d 1017 (8th Cir. 2005) (sufficient similarity).

139. *E.g.*, People v. Huy Ngoc Nguyen, 184 Cal. App. 4th 1096 (2010) (the trial judge should inquire whether the uncharged offense is similar to the charged behavior); People v. Escudero, 183 Cal. App. 4th 302,

there are significant similarities between the uncharged act and the charged sexual offense.

The courts are wise in doing so. As previously stated, the rape sword statutes permit the prosecution to introduce the uncharged misconduct as propensity evidence;[140] the statutes allow the prosecution to rely on the theory of logical relevance that the uncharged act shows the accused's propensity for sexual misconduct and that the accused's propensity increases the probability that the accused committed the charged offense.[141] Psychologists have studied the question of when it is permissible to treat a person's propensity or disposition as evidence of the person's conduct on a specific occasion. Their uniform findings show it is justifiable to do so only when the prior conduct is very similar to the alleged conduct on the specific occasion.[142] By adding the judicial gloss that the uncharged act admitted under a rape sword statute should be similar to the charged offense, the courts are enhancing the scientific reliability of the inference that the prosecution is inviting the jury to draw.

There is a direct parallel between the state of the law under the rape sword statutes and the jurisprudence on the admissibility of the alleged victim's prior false rape accusations. Research reveals no rape shield statute that explicitly restricts the admissibility of such evidence to accusations similar to the accusation in the instant case. Nevertheless, as in the case of rape sword statutes, the courts often insist that the alleged victim's other accusation parallel the pending charge; that insistence is warranted.[143] Again, the psychological research yields the conclusion that a person's trait or disposition may justifiably be treated as evidence of the person's conduct on a particular occasion only if the existence of the trait is proven by other instances of conduct similar to the alleged conduct on the particular occasion.[144] That psychological limitation applies to both the inference the prosecution wants the jury to draw under the rape sword statutes and the inference the defense desires the jury to make from false accusations admitted despite the rape shield statutes.

Thus, when determining the admissibility of supposedly false, prior rape accusations by the alleged victim, trial judges should assess the degree of

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(2010) (the uncharged acts were sufficiently similar to the charged crime); People v. Hollie, 180 Cal. App. 4th 1262 (2010) (several similarities); People v. Lewis, 46 Cal. 4th 1255 (2009) (the similarity between the charged offense and the uncharged act), *cert denied*, 559 U.S. 945 (2010); Alcala v. Superior Court, 147 Cal. App. 4th 1492 (2007) (a single dissimilarity does not render the uncharged act inadmissible), *rev'd, superseded*, 43 Cal. 4th 1205 (2008); People v. Isom, 145 Cal. App. 4th 1371 (2006) (the trial judge enjoys broad discretion in deciding whether the charged and uncharged acts are sufficiently similar), *review granted, superseded*, 154 P.3d 1002,(2007); People v. Pierce, 104 Cal. App. 4th 893 (2002).

140. *See supra* note 133 and accompanying text.

141. FED. R. EVID. 413(a).

142. Imwinkelried *Reshaping*, *supra* note 118, at 764–67.

143. *E.g.*, Fowler v. Sacramento County's Sheriff Dep't, 421 F.3d 1027, 1038, 1041 (9th Cir. 2005); White v. Caplan, 399 F.3d 18, 25 (1st Cir.), *cert. denied sub nom.*; Cattell v. White, 546 U.S. 972 (2005); State v. DeSantis, 155 Wis. 2d 774 (1990).

144. Imwinkelried *Reshaping*, *supra* note 118, at 760.

similarity between the charged offense and the conduct described in the prior accusations. Judges ought to weigh the following considerations, *inter alia:*

- Are the accusations both stranger rapes or both acquaintance rapes? The alleged victim's report in a stranger rape investigation in which the rapist's identity is the critical issue may shed little light on the credibility of her report in an acquaintance rape case where consent is the vital issue.

- What types of sexual conduct are involved in the charged crime and the offense described in the allegedly false report? Was the sexual conduct in both cases relatively conventional or in both instances was the conduct aberrant?

- What modus operandi did the alleged victim claim that the perpetrator followed in the charged and uncharged incidents? For example, it would certainly be curious and arguably implausible if the alleged victim claimed that in two unrelated stranger rapes, the perpetrators employed a strikingly similar modus.

The more similarities the defense can identify between the charged crime and the offense described in the prior report, the more credibly the defense can argue that the alleged victim's account of the charged crime is a scripted story rather than a truthful description of an actual event.

2. The Quantum of Proof that the Alleged Victim Made the Prior Report and that the Report Was Untruthful

Here too there is an important parallel between the state of the law under the rape sword and rape shield statutes. Before introducing evidence of an uncharged sexual assault under a rape sword statute such as Federal Rule 413, the prosecution must establish the foundational fact that the accused committed the uncharged assault.[145] Prior to the Supreme Court's 1988 decision in *Huddleston v. United States,*[146] the courts were badly divided over the standard for proving that foundational fact. A few old state cases took the position that the prosecution had to establish the accused's identity as the perpetrator of an uncharged act by the demanding standard of proof beyond a reasonable doubt.[147] Because many courts feared that evidence of an accused's uncharged misconduct could be extremely prejudicial to the accused, for some time the prevailing view was that

145. Taslitz, *supra* note 118, at 495.

146. 485 U.S. 681 (1988).

147. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, § 2:9, at 2-42-43 (citing decisions from Ohio, Texas, and Wisconsin).

the prosecution had to satisfy the enhanced standard of clear and convincing evidence.[148] A substantial minority adopted the contrary view that the prosecution had to persuade the judge that the accused perpetrated the uncharged act by a mere preponderance of the evidence.[149]

Huddleston would ultimately reject all those views and look to Federal Rule of Evidence 104(b), the statute codifying the conditional relevance procedure for deciding preliminary or foundational facts.[150] Rule 104(b) currently reads: "Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist."[151] Under 104(b), the judge plays a "limited, screening role."[152] The judge does not pass on the credibility of the foundational testimony and decide whether the foundational fact is true.[153] Rather, the judge accepts the foundational testimony at face value and makes a limited inquiry: If the jury chooses to believe the foundational testimony, does the testimony have sufficient probative value to support a permissive inference that the fact exists?[154]

The paradigmatic examples of conditional relevance foundational facts are a lay witness's personal knowledge under Rule 602 and the authenticity of an exhibit under Rule 901.[155] These facts condition the relevance of an item of evidence in a fundamental sense that should be obvious even to a layperson without any legal training. If the jury decides that a lay witness lacks personal knowledge of an event the witness purported to describe in his or her testimony, common sense will lead the jury to disregard the witness's testimony; the jury has decided, "the witness doesn't know what he's talking about." Similarly, when the jury decides that a confession purportedly signed by the accused is a forgery, they will naturally put the exhibit out of mind; the jury has determined "the exhibit isn't worth the paper it's written on." In *Huddleson,* the Court held that Rule 104(b) governs the foundational question of whether the accused committed an uncharged act offered under Rule 404(b).[156] As in the case of personal knowledge and authenticity, if the jury concludes that there is insufficient evidence that the accused perpetrated the uncharged act, simple logic ought to

148. *Id.* at § 2:9, at 2-44-47.

149. *Id.* at § 2:9, at 2-47-49.

150. Huddleston v. United States, 485 U.S. 681, 689–90 (1988).

151. FED. R. EVID. 104(b).

152. *Id.;* COURTROOM CRIMINAL EVIDENCE, *supra* note 17, at § 134.

153. Edward J. Imwinkelried, *Trial Judges: Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 4 (2000).

154. COURTROOM CRIMINAL EVIDENCE, *supra* note 17.

155. FED. R. EVID. 602; FED. R. EVID. 901.

156. Huddleston v. United States, 485 U.S. 681 (1988).

lead them to disregard the testimony about the uncharged act during their deliberations.[157]

Today most courts look to Rule 104(b) whether the prosecution offers testimony about the uncharged act under Rule 404(b) on a noncharacter theory[158] or as propensity evidence under Rule 413. It is true that a number of states such as Arizona, Colorado, Florida, Minnesota, Nebraska, Nevada, Tennessee, and West Virginia have refused to follow *Huddleston.*[159] However, today most jurisdictions have endorsed *Huddleston* and apply the conditional relevance standard to the question of the accused's identity as the perpetrator of an uncharged crime offered under either 404(b) or 413.[160]

When the accused attempts to introduce evidence of the alleged victim's prior false rape accusation despite a rape shield statute, the most contested foundational fact is usually the falsity of the prior report.[161] The state of the law on that question mirrors the split of authority over the standard for proving the accused's identity as the perpetrator under Rules 404(b) and 413.[162] Some jurisdictions demand that the accused establish the falsity of the alleged victim's report by clear and convincing evidence.[163] Others have opted for the preponderance of the evidence standard.[164] Still others apply *Huddleston* by

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157. *But see* Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 ST. LOUIS U. L. J. 813 (1988) (on the one hand, the article argues that the *Huddleston* approach is satisfactory when there is only one uncharged act; in that circumstance, the court can be reasonably confident that the jury is capable of disregarding the foundational testimony if they ultimately find that the accused did not commit the act; on the other hand, the article cautions that the 104(b) procedure may break down when the prosecution offers testimony about several uncharged acts; the jury may be tempted to rely on the common sense notion that "where there's smoke, there's fire").

158. Rule 404(b) reads:

> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses . . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

FED. R. EVID. 404. If the judge admits uncharged misconduct for a limited, noncharacter purpose under 404(b), on request by the defense the judge administers a limiting instruction to the jury under Rule 105. *Huddleston*, 485 U.S. at 691–92.

159. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, § 2:9, at 2-56-58.

160. *Id.* at §2:9, at 4.

161. State v. Walton, 715 N.E.2d 824, 827–828 (Ind. 1999); Jennifer Koboldt Bukowsky, *The Girl Who Cried Wolf: Missouri's New Approach to Evidence of Prior False Allegations*, 70 MO. L. REV. 813 (2005).

162. Bukoswsky, *supra* note 161, at 823–24; Michael Graham, *"Rape Shield" Statutes: Overview; Fed. R. Evid. 412; Mode of Dress, Statements of Sexual Nature, or Intention*, 48 CRIM. L. BULL. 1378, 1400–01 (2012).

163. Graham, *supra* note 162, at 1400–01.

164. Fisher v. Iowa, 560 F.Supp.2d 725 (S.D. Iowa 2008); Morgan v. State, 54 P.3d 332 (Alaska App. 2002); State v. Tarrats, 122 P.3d 581 (2005).

analogy and are satisfied if the defense presents sufficient evidence for the jury to decide that the alleged victim's other accusation was false.[165]

In principle, it seems correct to apply Rule 104(b)'s conditional relevance standard here. If the jury decides that the alleged victim did not make another report or that the report was truthful, the jurors will naturally treat the defense questioning about the supposedly false report as irrelevant.[166] The irrelevance of the questioning should be obvious even to lay jurors without legal training, and there hence would be little risk that the jury's exposure to the defense questioning would distort the jury's assessment of the alleged victim's credibility. Of course, if the jurisdiction in question still adheres to the view that the judge must apply a heightened standard such as clear and convincing evidence under its rape sword statute, the prosecution could argue that it would be even-handed to apply a similarly enhanced standard of proof to the falsity of the prior rape report. However, in the typical jurisdiction that applies the conditional relevance test under the rape sword legislation, it is defensible to employ the same test to determine the sufficiency of the evidence of the falsity of the alleged victim's report.

C. The Final Question: If on Cross-Examination the Alleged Victim Denies Either the Fact of the Prior Report or its Falsity, Should the Accused Be Permitted to Introduce Extrinsic Evidence to Establish that the Alleged Victim Made the Prior, False Report?

Assume that when the defense counsel cross-examines the alleged victim, the victim denies either that there was a prior rape report or that the report was false. In that event, should the defense counsel be allowed to introduce extrinsic evidence to prove the false report?

Even if the courts permit cross-examination on the topic of prior false reports, there is no logical necessity to allow the subsequent presentation of extrinsic evidence. Many, if not most, rape shield laws contain a provision requiring the accused to give the prosecution pretrial notice if the defense intends to offer evidence of the alleged victim's other sexual behavior.[167] Federal Rule of

165. State v. DeSantis, 155 Wis. 2d 774, 456 N.W.2d 600 (1990) (explaining that "a reasonable person could reasonably infer that the complainant made prior untruthful allegations of sexual assault"); Graham, *supra* note 162, at 1400–01 (2012).

166. Commonwealth v. Lefkowitz, 20 Mass. App. Ct. 513, 515 (1985). In this situation, rather than treating the evidence as impeaching the alleged victim's credibility, the jurors may regard the unsuccessful attempted impeachment as undercutting the defense's credibility.

167. ALA. CODE § 12-21-203 (2016); ALASKA STAT. § 12.45.045 (2015); A.R.S. § 13-1421 (2015); CAL. EVID. CODE § 782; CAL. EVID. CODE § 1103 (2016); C.R.S. 18-3-407 (2015); CONN. GEN. STAT. § 54-86f (2015); CONN. CODE OF EVID, 4-11 (2016); D.C. CODE § 22-3022 (2016); FLA. STAT. § 794.022 (2015); O.C.G.A. § 24-4-412 (2015); HAW. REV. STAT. § 412 (2015); IDAHO R. EVID. 412 (2016); 725 ILL. COMP. STAT. 5/115-7 (2016); IND. R. EVID. 412 (2016); IOWA R. EVID. 5.412 (2016); KY. R. EVID. 412 (2016); LA. CODE. EVID. Art. 412 (2015); ME. R. EVID. 412 (2015); MD. CRIM. CODE ANN. § 3-319 (2016); MASS. GEN.

Evidence 412(c) contains such a provision,[168] and the California rape shield law, extending the law to credibility evidence, similarly prescribes a procedure mandating notice.[169] The defense could make an offer of proof[170] outside the jury's presence or, for that matter, at a pretrial hearing before a jury has been selected. If the defense offer fell short of satisfying the similarity requirement and the quantum of proof threshold, the judge would preclude the defense from mentioning the alleged false report during cross-examination.[171] However, if the defense offer is satisfactory, the defense counsel could question the alleged victim about the report. The law could take the stance that if the alleged victim denies making the report, the inquiry is at an end; even if cross-examination is permissible, extrinsic evidence might be barred.

That stance is not only a logical possibility—it is the current state of the law.[172] As previously stated, Federal Rule of Evidence 608(b) permits an opponent to cross-examine a witness about prior deceitful conduct.[173] However, the rule expressly states that "extrinsic evidence is not admissible to prove" the specific conduct.[174] The opponent must "take" the witness's answer to the question.[175] It is true that the cross-examiner may press the witness for a truthful answer by reminding the witness of the penalties for perjury.[176] However, in most jurisdictions the cross-examiner can go no further. Given Rule 608(b)'s unequivocal language, one court held that even confronting the witness during cross-examination with a "few lines" from a judicial opinion finding the witness

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LAWS Ch. 233, § 21B (2016); MICH. R. EVID. 404 (2015); MINN. STAT. § 609.347 (2015); MISS. CODE ANN. § 97-3-68 (2015); MO. REV. STAT. § 491.015 (2015); MONT. CODE. ANN. § 45-5-511 (2015); NEV. REV. STAT. ANN. § 48.069 (2015); N.H. R. EVID. 412 (2016); N.J. REV. STAT. § 2C:14-7 (2015); N.M. STAT. ANN. § 30-9-16 (2015); N.Y. CRIM. PROC. LAW § 60.42 (2015); N.D. R. EVID. 412 (2015); OHIO REV. CODE ANN. § 2907.02 (2015); 12 OKLA. ST. TIT. 12, § 2412 (2015); OR. REV. STAT. § 40.210 (2015); 18 PA. CONS. STAT. ANN. § 3104 (2015); R.I. GEN. LAWS § 11-37-13 (2016); S.C. CODE ANN. § 16-3-659.1 (2015); TENN. R. EVID. 412 (2015); TEX. R. EVID. 412 (2015); UTAH R. EVID. 412 (2016); VA. CODE ANN. § 18.2-67.7 (2016); WASH. REV. CODE § 9A.44.020 (2016); W. VA. CODE § 61-8B-11; WIS. STAT. § 972.11 (2015); FED. R. EVID. 412 (2016).

168. FED. R. EVID. 412.

169. CAL. EVID. CODE § 782(a).

170. Adams v. Smith, 280 F.Supp.2d 704, 713–14 (E.D. Mich. 2003).

171. *Id.* at 714.

172. FED. R. EVID. 608(b).

173. FED. R. EVID. 608(b).

174. *Id.*

175. FED. R. EVID. 608(b).

176. If the witness is sophisticated, he or she may realize that the prospect of a perjury persecution is a hollow threat. Perjury prosecutions are few and far between. In 2013, although 90,992 criminal charges were filed in federal court, there were only twenty-eight perjury charges. In 2012, the figure was twenty-seven, and in 2011, the figure was 26. Statistical Tables–U.S. District Courts–Criminal, United States Courts, http://www.uscourts.gov/ Statistics/JudicialBusiness/2013/statistical-tables-us-district-courts-criminal.aspx. (on file with *The University of the Pacific Law Review*). *See* Jeffrey Rosen, *Is There a Perjury Epidemic?*, N.Y. TIMES, July 2011, at BR17 (explaining that the crime is "too little prosecuted to generate any meaningful statistics"); *see also* James M. Schellenberger, *Perjury Prosecutions After Acquittals: The Evils of False Testimony Balanced Against the Sanctity of Determinations of Innocence*, 71 MARQ. L. REV. 703, 705 (1988) (elaborating on the problems associated with few perjury prosecutions).

guilty of civil fraud violated the statutory ban on extrinsic evidence.[177] Whatever else the ban entails, it certainly means that after witness #1 (the witness to be impeached) leaves the stand, the opponent cannot call another witness #2 to testify to witness #1's untruthful conduct or to authenticate an exhibit establishing witness #1's untruthful conduct. This is not only seemingly settled law. In its 2013 decision in *Nevada v. Jackson*,[178] the Supreme Court made the following comment about a state statute codifying the prohibition of extrinsic evidence:

> The[re] are "good reason[s]" for limiting the use of extrinsic evidence . . . and the [state] statute [upheld in this case] is akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness's conduct to prove the witness's character for untruthfulness. See Fed. Rule Evid. 608(b) . . . . The constitutional propriety of this rule cannot be seriously disputed.[179]

Yet, there are serious questions about the wisdom of the prohibition.[180] Proof of a witness's untruthful conduct is the only impeachment technique subject to an absolute ban on extrinsic evidence.[181] In the case of every other impeachment technique—for example, a prior inconsistent statement, bias, specific contradiction, the witness's deficiency in an element of competency such as perceptual ability, or prior conviction[182]—at least in some circumstances the cross-examiner may resort to extrinsic evidence if the witness denies the impeaching fact. As a question of first impression, it is difficult to justify singling out proof of a witness's untruthful conduct for an absolute ban on extrinsic evidence. Pragmatically, "[i]n many cases, proof of a witness's untruthful act will give the trier [of fact] far more valuable insight into a witness's credibility than either a prior inconsistent statement or a specific contradiction."[183] A technically admissible prior inconsistent statement may be of little probative value:

> Whenever a person gives multiple descriptions of the same event or fact, it is almost inevitable that there will be differences between the two accounts. It would be extraordinary if there was not differences.[184]

177. United States v. Herzberg, 558 F.2d 1219, 1222–23 (5th Cir.), *cert. denied*, 434 U.S. 930 (1977).

178. 133 S. Ct. 1990 (2013).

179. *Id.* at 1993.

180. *See generally* Imwinkelried *Formalism*, *supra* note 121, at 213.

181. FED. R. EVID. 608(b).

182. Imwinkelried *Formalism*, supra note 121, at 220–27.

183. *Id.* at 236.

184. *Id.*

The same can be said of specific contradiction impeachment: "Even when two percipient witnesses observe the same event from the identical vantage point, they usually come with away with at least slightly different recollections of the event."[185]

Moreover, although the Supreme Court may have no doubts about the constitutionality of Rule 608(b)'s absolute ban, it is clear that many lower courts have misgivings about the wisdom of the ban.

- Some courts now permit the cross-examiner to confront the witness with documentary evidence of the witness's deceitful conduct if the witness is competent to authenticate the documentary exhibit.[186] When the witness is competent to lay the foundation for the exhibit, the presentation of the exhibit will consume little additional court time.

- A growing number of courts allow the opponent to later present formal legal findings that the witness has engaged in deceitful conduct.[187] These courts reason that "findings by judges or juries" are especially reliable.[188]

- Most significantly, several jurisdictions have squarely held that a defendant accused of rape should be permitted to introduce extrinsic evidence of an alleged victim's prior, false rape complaints.[189] One of the leading decisions is *Miller v. State*.[190] There the Nevada Supreme Court held both that an accused may cross-examine the alleged victim about previous fabricated assault accusations and that if the alleged victim denies making a false accusation, the accused may introduce extrinsic evidence to contradict the denial.[191] In the words of one federal court, "numerous state courts" have adopted the same position.[192]

These three lines of authority call into question the soundness of maintaining a rigid ban on impeaching extrinsic evidence of a witness's untruthful conduct. In particular, the emergence of the third line of authority suggests that it is time to reconsider the application of the traditional inflexible ban to extrinsic evidence of

185. *Id.* at 237.

186. *Id.* at 232.

187. *Id.* at 228–29.

188. United States v. Dawson, 434 F.3d 956 (7th Cir. 2006), *cert. denied*, 549 U.S. 1101 (2006).

189. *Id.* at 230–31.

190. 105 Nev. 497 (1989).

191. Miller v. State, 105 Nev. 497, 502 (1989).

192. United States v. Stamper, 766 F. Supp. 1396, 1399 n. 2 (W.D.N.C. 1991), *aff'd sub nom.*; *In re* One Female Juvenile Victim, 959 F.2d 231 (4th Cir. 1992).

an alleged rape victim's prior false complaints. As mentioned, the policy case for the enactment of the rape sword laws rests primarily on the assumption that there is an acute need for credibility evidence in rape prosecutions that often degenerate into "he said, she said" disputes.[193] However, that assumption is a two-edged sword.[194] To be sure, positing that assumption, prosecutors can argue that they need to introduce otherwise inadmissible evidence of the accused's uncharged misconduct to enhance the alleged victim's credibility to prevent wrongful acquittals. But by the same token, defense counsel can cite the same assumption and contend that they need the extrinsic evidence of the alleged victim's prior false accusations to prevent wrongful convictions.

In this situation, defense counsel can argue that given the importance of credibility determinations in rape prosecutions, it is wrong-minded to limit the defense to cross-examination about an alleged victim's prior false accusations. Consider the defense's plight if its only right is to cross-examine and the defense consequently cannot introduce extrinsic evidence to expose an alleged victim's perjurious denial of a prior false accusation. To begin with, in most jurors' eyes, an alleged rape victim is one of the most sympathetic witnesses. Many jurors find sexual misconduct especially repulsive.[195] In a national survey conducted by the Justice Department's Bureau of Justice Statistics, rape was rated the second most heinous offense—only homicide received a higher rating.[196] A comparable *People* magazine survey yielded the same results: while the typical layperson regarded murder as the most despicable conduct, rape was again rated second.[197]

An unsuccessful cross-examination of the alleged victim about a prior false rape accusation can make the complainant seem even more sympathetic in the jurors' eyes. Even if the alleged victim perjuriously denies the prior accusation, the confrontation between the defense attorney and the alleged victim could generate additional sympathy for the alleged victim. It is an old adage in trial work that "if you attack the king, you must kill the king."[198] If you level a serious accusation against a witness but fail to produce proof substantiating the

193. People v. Walker, 139 Cal. App. 4th 782, 801 (2006).

194. Imwinkelried *Formalism*, *supra* note 121, at 231.

195. Gravley v. Mills, 87 F.3d 779, 790 (6th Cir. 1996) ("such cases 'exert an almost irresistible pressure on the emotions" of the jurors and judges); United States v. Buhl, 712 F. Supp. 53, 57 (E.D. Pa. 1989) (a "heightened" standard is necessary when evaluating the potential for prejudice posed by evidence of sexual misconduct), *aff'd*, 879 F.2d 1219 (3d Cir. 1990); State v. Coe, 101 Wash.2d 772, 684 P.2d 668, 673 (1984) ("Careful consideration . . . is particularly important in sex cases, where the potential for prejudice is at its highest"). On occasion, the courts have observed that an allegedly attacked woman can be an especially sympathetic figure on the witness stand. 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at § 8:24, at 8-120 (rev. 2004).

196. *How Do Americans Rank the Severity of Crime?* INSIDE DRUG LAW, Sept. 1984, at 9, *cited in* 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at § 8:24, at 8-117-18 (rev. 2004).

197. *Sin*, PEOPLE, Feb. 10, 1986, at 106, 108. On occasion, the courts have observed that an allegedly attacked woman can be an especially sympathetic figure on the witness stand. 2 UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at § 8:24, at 8-120 (rev. 2004).

198. Imwinkelried *Formalism*, *supra* note 121, at 240.

accusation, the jurors may resent the accusation and hold it against the cross-examiner.[199] In all probability, lay jurors will not realize that the opponent is limited to cross-examination and may not present extrinsic evidence of the prior false report. All they know is that the defense attorney leveled an accusation, the alleged victim denied the accusation, and the defense attorney then failed to present any evidence to prove up the accusation. The jurors may regard the cross-examination as a second cruel victimization of the complainant—an initial rape by the accused and then baseless harassment by the accused's attorney. For that matter, if the alleged victim's denial is emphatic, her persuasive demeanor[200] may convince the jury that there was indeed a prior rape. If so, the net effect of the defense cross-examination could be to raise the sympathy factor working in the alleged victim's favor to the third power. Allowing the accused to present extrinsic evidence is the necessary antidote.

IV. CONCLUSION

The adoption of the rape sword statutes was a dramatic change in American Evidence law. In adopting the statutes, Congress and the various states made a significant departure from a "long standing [legal] tradition."[201] Namely, the well-settled doctrine that the prosecution could not infer the accused's bad character from the accused's uncharged crimes and then treat that character as circumstantial proof of guilt of the charged crime. That doctrine forbade the prosecution from reasoning, "he did it before, therefore he did it again."[202] The enactment of the federal sword statute, Federal Rule 413, was even more noteworthy, since Congress adopted the rape sword statute over the vocal opposition of both the American Bar Association and the United States Judicial Conference.[203] Congress evidently took that extraordinary step because it was impressed by the Justice Department's argument[204] that rape prosecutions frequently become swearing contests and that in such cases, the prosecution needs to present corroboration for the alleged victim's testimony to prevent the jury from unjustifiably discounting the alleged victim's credibility.

In a sense, the defense case for introducing evidence of an alleged victim's prior false rape accusations is another side of the same coin as the rape sword statutes. The defense case has the same starting point as the case for rape sword

199. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS AND MATERIALS § 10.2 (4th ed. 2010).

200. *See generally* Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183 (1985).

201. Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989); *see also* United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989) ("long-established notions of fair play and due process").

202. State v. Deyling, 1998 Ohio App. LEXIS 255 1998 WL 46753 (Ohio Ct. App. Media Cty. Jan. 28, 1998).

203. UNCHARGED MISCONDUCT EVIDENCE, *supra* note 18, at 2-178-79.

204. *Id.* at § 2:25, at 2-168.

statutes: the assumption that in an unusually high percentage of cases, the outcome of a rape prosecution turns on the jurors' assessment of the relative credibility of the alleged victim and the accused. The outcome of the typical rape case does not depend on some nuance of the legal definition of rape[205] or on the strength of an inference from physical evidence in the case.[206] If the Justice Department's case for the rape sword statute is correct, rape trials ordinarily turn on a starker determination by the jury: Who is lying? And if that is true, the accused ought to be entitled to put the jury in a better position to evaluate the alleged victim's credibility by informing the jury that the complainant has made a prior, false accusation. To be sure, the accused should not have carte blanche to inquire about other accusations. As Part II.B noted, defense inquiry ought to be permitted only when the defense can show that (1) the earlier report described sexual behavior very similar to the charged crime and (2) there is sufficient evidence to support permissive inference that the earlier report was false.[207] However, when the accused can satisfy those two requirements, the defense should not only be allowed to cross-examine the alleged victim about the report;[208] if the alleged victim denies the report or its falsity, the defense should also be allowed to present extrinsic evidence of the false report to the jury.[209]

Symmetry in the law does not always guarantee fairness in the law. There are constitutional asymmetries built into the American criminal justice system. Under the Fifth Amendment, the government can use the grand jury system to quickly and efficiently collect large quantities of evidence for prosecution.[210] Although the accused has pretrial discovery rights,[211] the accused cannot initiate a grand jury investigation.[212] Under the same amendment, though, the accused has a privilege against self-incrimination[213] that enables the accused to altogether refuse to testify—a right that prosecution witnesses do not enjoy. However, putting aside those exceptions, it remains true that ours is an adversary system of justice.[214] For an adversary system to operate fairly, there must be a certain equality between the accused and the prosecuting sovereign.[215] There must be relatively evenhanded, symmetrical rules allowing both sides to effectively litigate the pivotal issues determining innocence or guilt. The premise of the rape

205. CARLSON & IMWINKELRIED, *supra* note 199, at § 14.2(D), at 400; § 14.2(E), at 410 (a legal standard case).

206. *Id.* at § 14.2(D), at 399, § 14.2(E), at 408 (a historical inference case).

207. *See supra* Part II.B; Imwinkelried *Reshaping*, *supra* note 118, at 765.

208. *See supra* Part II.B; Imwinkelried *Reshaping*, *supra* note 118, at 765.

209. *Id.*

210. U.S. CONST. amend. V.

211. Brady v. Maryland, 373 U.S. 83 (1963).

212. 1 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §101 (4th ed.).

213. U.S. CONST. amend. V.

214. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

215. Akhil Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L. J. 641 (1996).

sword laws is that the outcome of the typical rape prosecution turns largely on the jurors' assessment of the credibility of the alleged victim.[216] Based on that premise, the rape sword laws allow the prosecution to bolster the alleged victim's credibility by presenting corroborating evidence sufficient to prove that in the past, the accused has committed similar sexual crimes.[217] Positing the same premise, the rape shield laws should be construed to enable the defense to attack the alleged victim's credibility by presenting evidence sufficient to prove that in the past, the alleged victim has made similar, false accusations.[218] Proof of the alleged victim's prior false accusations is just as corroborative of the accused's claim that the alleged victim is falsely accusing him as proof of the accused's prior sexual assaults is corroborative of the alleged victim's claim that he assaulted her.[219] In this setting, formulating symmetrical evidentiary rules is an important step toward ensuring the fairness of the adversary trials in rape prosecutions.

216. Bennet Capers, *Real Women, Real Rape,* 60 UCLA L. REV. 826 (2013).

217. FED. R. EVID. 413.

218. FED. R. EVID. 412.

219. People v. Avila, 59 Cal. 4th 496, 515 (2014).